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Supreme Court, U.S.
FILED
MAR 21 1996
CLERK

No. 95-1399

In The

Supreme Court of the United States

October Term, 1995

MARLYN EADES and JOAN EADES,

Petitioners,

vs.

CLARK DISTRIBUTING COMPANY, INC. and LESLIE DALE TROVILLION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court properly apply the analysis set forth in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) in its dismissal of the plaintiff's claims on limitations for their failure to timely issue a summons as required by state law, the court finding no "direct conflict" between the 1993 amendments to the Rule No. 4 of the Federal Rules of Civil Procedure, as compared with Kentucky Revised Statute 413.250 and Rule 3 of the Kentucky Rules of Civil Procedure which require the issuance of a summons in order to commence a civil action?

PARTIES TO THE PROCEEDINGS

Petitioners, Marlyn Eades and Joan Eades, at all times relevant to these proceedings, are citizens and residents of the State of Ohio. The Petitioners were the plaintiffs in the trial court proceedings, and they were the appellants before the United States Court of Appeals for the Sixth Circuit.

Respondent, Clark Distributing Company, Inc., is a privately owned Kentucky corporation, and it has no parent or nonwholly owned subsidiary companies. Respondent, Leslie Dale Trovillion, was an employee driver of Clark Distributing Company, Inc. The Respondents were the defendants in the trial court proceedings and the appellees before the United States Court of Appeals for the Sixth Circuit.

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Appendix B — Relevant Rules of Civil Procedure at Issue 3a

Respondents, Clark Distributing Company, Inc. (hereinafter "Clark Distributing") and Leslie Dale Trovillion (hereinafter "Trovillion") respectfully submit that no Writ of Certiorari should issue in this case, as the United States Court of Appeals for the Sixth Circuit properly affirmed the judgment of the trial court in dismissing the plaintiffs' claims based upon limitations.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Eades v. Clark Distributing Co., Inc.*, 70 F.3d 441 (6th Cir. 1995). It is reprinted in full in the petitioners' appendix to their brief. The Opinion of the United States District Court for the Western District of Kentucky is unpublished, and it is reprinted in full in the petitioners' appendix to their brief. The Order of the United States District Court for the Western District of Kentucky overruling the plaintiffs' post-trial motions is unpublished, and it is reprinted in the appendix beginning at page 1a.

STATUTES AND RULES INVOLVED

Kentucky Revised Statutes 413.250

When action commences

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of the action.

Federal Rules of Civil Procedure, Rule 3

> A civil action is commenced by filing a complaint with the court.

Federal Rules of Civil Procedure, Rule 4

> The provisions of Rule 4 are lengthy; to this extent, this rule is set forth in pertinent part in the appendix to this brief.

Kentucky Rules of Civil Procedure, Rule 3

> A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Kentucky Rules of Civil Procedure, Rule 4

> The provisions of Kentucky Rule 4 are lengthy; to this extent, this rule is set forth in pertinent part in the appendix to this brief.

STATEMENT OF THE CASE

On January 13, 1992, Marlyn and Joan Eades, the petitioners herein, were involved with respondent, Leslie Dale Trovillion in a motor vehicle accident occurring in Bibb County, Georgia. Trovillion was in the course and scope of his employment with respondent Clark Distributing. This motor vehicle accident served as the underlying basis for the petitioners' civil claims against the respondents herein. The petitioners filed a *pro se* complaint in the United States District Court for the Western District of Kentucky on January 11, 1994

based upon diversity jurisdiction. Marlyn and Joan Eades did not present a summons to the clerk for signature and seal with the filing of their complaint; therefore, no summons was issued to the plaintiff for service on the defendants at the time of the filing of the complaint. In fact, summons was not issued until April 5, 1994. Further, the petitioners did not otherwise notify the respondents of any commencement of any action, nor did the petitioners request that the respondents waive service of any summons.

Upon the issuance of summons on April 5, 1994, service was accomplished on Clark Distributing and Trovillion, and they both timely answered the plaintiffs' complaint, pleading limitations as an affirmative defense.

On June 6, 1994, Clark Distributing and Trovillion moved for summary judgment on the issue of limitations. Marlyn and Joan Eades filed no response. Summary judgment was granted by the trial court by its order dated July 1, 1994.

On July 20, 1994, Marlyn and Joan Eades filed a post-judgment motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The motion did not substantively address any of the grounds upon which the dismissal was previously granted; it simply argued that the matter was dismissed on "a technicality."[1] This post-judgment motion admittedly does not

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1. Marlyn and Joan Eades filed their post-judgment motion *pro se*; however, the contents of the motion indicate that the plaintiffs had counsel all along who did not enter an appearance of record in that they were not admitted to practice in Kentucky. Marlyn and Joan Eades acknowledged the receipt of the defendants' motion for summary judgment, but they asserted, because of their ignorance, they did not realize that a response was required. Clark Distributing and Trovillion were otherwise completely unaware of the identity of counsel for the Eades; accordingly, service of the motion for summary judgment was never made upon any attorney for the Eades.

raise any of the issues which the Eades presented to the United States Court of Appeals for the Sixth Circuit and also for which they now seek judicial review by this court.

The defendants at the trial level appropriately and timely responded to the plaintiffs' post-judgment motion. On August 18, 1994, the trial court overruled the Eades' post-judgment motion, noting that neither the law upon which the motion was based, nor the facts of the case, required a different result. The Eades appealed the decision of the trial court to the United States Court of Appeals, which affirmed the dismissal by a reported opinion styled *Eades v. Clark Distributing Co., Inc.*, 70 F.3d 441 (6th Cir. 1995).

SUMMARY OF ARGUMENT

The sole issue for which the petitioners seek review of this court was previously and properly decided in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). Therein, this Court held that there was no indication in the federal rules that the filing of an action, in and of itself, was sufficient to toll a state statute of limitations, much less that the federal rule would displace state tolling rules as they relate to limitations. Kentucky law requires that a summons be issued in order to commence an action and toll limitations; in the matter before the court, this was admittedly not accomplished by the petitioners. Therefore, the dismissal of this case was proper under the very clear language of *Walker*, *supra*.

REASONS FOR DENYING THE WRIT

Kentucky law requires that an action for personal injuries sustained in a motor vehicle accident is to be commenced not later than two years after the accident date, assuming that there are no payments of basic reparation benefits. Kentucky Revised

Statute 304.39-230(1). The petitioners concede a two year period of limitations applies to the instant action, and there has never been any factual dispute as to an occurrence date of January 13, 1992.

Further, Kentucky Revised Statute 413.250 expressly provides that "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of the action." Therefore, the petitioners herein filed their personal injury claim with the clerk of the United States District Court for the Western District of Kentucky within the limitations period following the accident in issue; however, summons was not issued until over three months later on April 5, 1994.

This case obviously invokes the principles which were first enunciated in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), which has come to be known as the "outcome test." In short, the Court in *Erie* determined that the outcome of litigation in federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in state court. *See Guaranty Trust Co. v. York,* 326 U.S. 99 (1945). In *Guaranty Trust,* the United States Supreme Court expressly held that statutes of limitation are substantive, as opposed to procedural, in nature.

The petitioners' reliance upon *Hanna v. Plumer,* 380 U.S. 460 (1965) is misplaced. *Hanna* simply stands for the proposition that if the terms of a federal rule plainly address the contested aspect of the litigation, then an analysis under the Rules Enabling Act and the Constitution is necessary. *Hanna v. Plumer,* 380 U.S. at 470-471. The test under the Rules Enabling Act examines whether the rule is truly procedural. The constitutional test is satisfied if the rule is within the ambit of a constitutional grant such as the Necessary and Proper Clause of

Article I. On the other hand, if the plain meaning of the federal rule does not cover the point in dispute, then the principles drawn from *Erie* serve as a bar against encouraging forum shopping or inequitable administration of the law. Under an *Erie* analysis, when the state's rule on tolling is an integral part of the state's substantive policies, it will apply over practice under the federal rule.

The Court, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), examined Fed. R. Civ. P. 3, which simply states that "[a] civil action is commenced by filing a complaint with the court." The *Walker* Court held that Rule 3 did not indicate that it tolled a state statute of limitations; therefore, an *Erie* analysis was required. The state rule, which did explicitly deal with tolling upon filing, was an integral part of the state's substantive statute of limitations giving the state rule, and not federal practice, control on the tolling issue. *Walker* at 746-47.

Kentucky Revised Statute 413.250 expressly states that an action commences with the issuance of summons. This is echoed in Rule 3 of the Kentucky Rules of Civil Procedure. Moreover, Kentucky courts have consistently held that a summons is necessary in order to toll the statute of limitations. *Whittinghill v. Smith*, 562 S.W. 2d 649 (Ky. App. 1977); *Brock v. Turner Fuel Co.*, 296 Ky. 729, 178 S.W. 2d 427 (1944).

Therefore, applying the *Erie* outcome test to the matter now pending, it is clear that the dismissal of the complaint was entirely proper. Throughout these proceedings, the Eades have completely ignored the holding of *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949), wherein this Court held that a federal court in a diversity case *must* follow the state rule with regard to the commencement of an action for limitations purposes. *Hanna*, upon which the petitioners rely, certainly did not overrule *Ragan*, and this Court expressly noted this in *Walker*

v. Armco Steel Corp., supra. In fact, *Ragan* expressly holds that a state statute that does not deem an action to be commenced until service of process on the defendant is accomplished must be applied by a federal court in diversity litigation. The Eades, in their arguments now before this Court, are making the very same arguments which were previously presented in *Ragan* and *Walker,* and this Court has expressly held:

> This Court in *Hanna* distinguished *Ragan* rather than overruled it, and for good reason. Application of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. 380 U.S., at 472 [85 S. Ct. at 1144]. Rule 3 simply states that a civil action is commenced by filing a complaint with the court. There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations. . . .
>
> Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply. Instead, the policies behind *Erie* and *Ragan* control the issue whether, in the absence of a Federal Rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in Federal

> Court under diversity jurisdiction. . . .There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in Federal Court solely because of the fortuity that there is diversity of citizenship between the litigants.

Walker, 446 U.S. at 749-753 (footnotes omitted).

Moreover, the petitioners have argued throughout these proceedings that *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) and *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1 (1987) support their position. It must be remembered, however, that *Walker* was cited with approval in both *Stewart Org., supra,* and *Burlington, supra.* Importantly, *Stewart* cites *Walker* as an example of federal and state rules existing side by side. *Stewart,* 487 U.S. at 31. This Court has consistently regarded state statutes of limitation as being unique and having consistently ruled in keeping with *Erie* since that holding was delivered in 1938. The various Circuit Courts, when presented with this same issue, have uniformly followed the rule of *Walker* and held that state law determines when limitations are tolled. *Walker v. Thielen Motors, Inc.*, 916 F.2d 450, 451 (8th Cir. 1990); *Patterson v. American Bosch Corp.*, 914 F.2d 384, 387 (3d Cir. 1990); *Converse v. General Motors Corp.*, 893 F.2d 513, 516 (2d Cir. 1990); *Mullen v. Sears, Roebuck & Co.*, 887 F.2d 615, 616-18 (5th Cir. 1989); *Rowland v. Patterson,* 852 F.2d 108, 110 (4th Cir. 1988), *on reh'g,* 882 F.2d 97 (4th Cir. 1989); *State of Wis. Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1573 (S.D. Fla. 1991).

Given the Supreme Court's holding in *Walker* that Rule 3

was not intended to affect the tolling of limitations, it is most obvious that the revised Rule 4 is an even less likely candidate in the search for a "direct collision" between the state and federal rules. Absolutely nothing in the text of the new Rule 4 relates in any way to tolling limitations. Additionally, the Advisory Committee also explicitly recognized that state laws would be unaffected by the new amendments, noting:

> Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. *Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by the filing of the action.* Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

Fed. R. Civ. P. 4 advisory committee notes, 1993 amendments (emphasis added).

Finally, this Court should again be advised that Clark Distributing and Trovillion never received any notice whatsoever from the Eades regarding the filing of the complaint. The Eades never requested that Clark Distributing or Trovillion waive service of a summons in accordance with Rule 4(d)(2), and the trial court certainly never imposed any costs in effecting service upon Clark Distributing or Trovillion for their failure to waive service, as a waiver was never requested. Therefore, it is respectfully submitted that the Eades cannot now rely upon a rule that they did not even attempt to invoke at the trial level and upon which they never presented the trial court an opportunity to rule.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari in the instant action should be denied. The United States Court of Appeals for the Sixth Circuit correctly affirmed the decision of the trial court in its dismissal of all claims for the petitioners' failure to commence their action in accordance with the applicable substantive law of Kentucky. The issue presented within the petition has been consistently resolved by this Court in a manner which dictates a dismissal.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN DATED AUGUST 18, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

ACTION C94-0005BG(H)

MARLYN EADES AND JOAN EADES

PLAINTIFFS

VS.

CLARK DISTRIBUTING CO., INC. AND LESLIE DALE TROVILLION

DEFENDANTS

ORDER DENYING MOTION ON BEHALF OF PLAINTIFFS FOR FRCP 60(B) RELIEF FROM JUDGMENT

This matter is before the court on motion of plaintiffs for relief from the judgment entered July 7, 1994. The individual plaintiffs argue that because of their own lack of knowledge, they were not aware of their obligation to respond to the motion for summary judgment on behalf of defendants. The plaintiffs further argue that their attorneys are not licensed to practice law in the Commonwealth of Kentucky.

The facts remain the same, and the motion cites no authority requiring a different result. This court concludes the motion fails

to state grounds for relief in accordance with FRCP 60(b) and the court being sufficiently advised,

IT IS ORDERED that the motion of the two plaintiffs for relief from the July 7, 1994, judgment, based upon FRCP 60(b) is **DENIED**.

This 18th day of August, 1994.

APPENDIX B — RELEVANT RULES OF CIVIL PROCEDURE AT ISSUE

FEDERAL RULES OF CIVIL PROCEDURE, RULE 4

RULE 4. SUMMONS

(b) **Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) **Service With Complaint; by Whom Made.**

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint . . .

(d) **Waiver of Service; Duty to Save Costs of Service; Request to Waive.**

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice

of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a

reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. . . .

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

KENTUCKY RULES OF CIVIL PROCEDURE, CR 4. PROCESS

CR 4.01 Summons; Issuance; By Whom Served

(1) Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either:

Appendix B

(a) Place a copy of the summons and complaint (or other initiating document) to be served in an envelope, address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished by the initiating party, affix adequate postage, and place the sealed envelope in the United States mail as registered mail or certified mail return receipt requested with instructions to the delivering postal employee to deliver to the addressee only and show the address where delivered and the date of delivery. . . .

(b) Cause the summons and complaint (or other initiating document), with necessary copies, to be transferred for service to any person authorized, other than by paragraph (1) of this Rule, to deliver them, who shall serve the summons and accompanying documents, and his return endorsed thereon shall be proof of the time and manner of service.

CR 4.04 Personal Service; Summons and Initiating Document

(1) . . . The initiating party shall furnish the person making service with such copies as may be necessary.